APPEAL NO. 010204

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 4, 2001. The hearing officer determined that the respondent's (claimant) compensable injury of _____, "extends to include a non-union fusion at L5-S1" and that the claimant had disability from February 22, 1999, through the date of the CCH.

The appellant (carrier) appealed, contending that the claimant's current problems were due to "a non-union of her prior fusion," that the claimant had continued to work at a video store, and that the employer had made a bona fide offer of employment (BFOE). The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant had sustained a prior low back injury in _____, had spinal fusion surgery in 1989, and had returned to work in 1990. The claimant testified, and there is no evidence to the contrary, that after her recovery from surgery in 1990 she was active in sports, played softball and water-skied. In 1999, the claimant was working full-time as a cashier in a video store (from 8:00 a.m. to 4:00 p.m.) five days a week and was working part-time as a stocker for the employer gas/convenience store chain. The parties stipulated that the claimant sustained a compensable (low back) injury stocking 12-packs of soda on _____.

The claimant saw several doctors and received physical therapy and medications before eventually returning to Dr. G, who had performed her 1989 surgery. In a report dated February 28, 2000, Dr. G wrote "the reason that [claimant] had done so well initially was that she had a stable pseudoarthrosis; and then with her recent injury in February of 1999, more than likely she had torn some of the scar tissues from this pseudoarthrosis." The hearing officer cites this report, other reports from Dr. G, and reports from Dr. W to support her decision. There is really no evidence to the contrary other than the statements of several doctors who refer to the present injury as a "nonunion." The carrier suggests that the claimant has had a "nonunion" all along from her 1989 surgery. This is belied by the fact that the claimant was active physically and was working two jobs.

On the issue of disability, it is undisputed that the claimant continued to work her video store cashier job, because it involved sedentary sitting, until the beginning of August 1999 and that at one point the claimant's then treating doctor had released the claimant to light duty. The carrier argues that the employer made the claimant a BFOE by writing her a letter, sent from the employer's out-of-state home office, suggesting that the claimant contact the manager of the employer's local store. The claimant testified that she did so but the manager did not call her back. Although a BFOE was not an issue at the CCH, the hearing officer commented that the letter does not, on its face, comply with the

requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c)(2) (Rule 129.6(c)(2)), and that the claimant had "testified credibly" about her efforts to contact the store manager.

The hearing officer's decision is supported by, and is not so against, the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge